Senate Engrossed House Bill

FILED
JANICE K. BREWER
SECRETARY OF STATE

State of Arizona
House of Representatives
Forty-sixth Legislature
Second Regular Session
2004

CHAPTER 190

HOUSE BILL 2351

AN ACT

AMENDING SECTIONS 41-2503, 41-2534, 41-2535, 41-2556, 41-2559, 41-2632 AND 41-2701, ARIZONA REVISED STATUTES; RELATING TO THE STATE PROCUREMENT CODE.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 41-2503, Arizona Revised Statutes, is amended to read:

41-2503. Definitions

In this chapter, unless the context otherwise requires:

1. "Architect services" means those professional architect services that are within the scope of architectural practice as provided in title 32, chapter 1.

2. "Business" means any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture or other private legal entity.

3. "Change order" means a written order which is signed by a procurement officer and which directs the contractor to make changes that the changes clause of the contract authorizes the procurement officer to order.

4. "Construction":

(a) Means the process of building, altering, repairing, improving or demolishing any public structure or building, or other public improvements of any kind to any public real property.

(b) Does not include:

(i) The routine operation, routine repair or routine maintenance of existing facilities, structures, buildings or real property.

(ii) THE INVESTIGATION, CHARACTERIZATION, RESTORATION OR REMEDIATION DUE TO AN ENVIRONMENTAL ISSUE OF EXISTING FACILITIES, STRUCTURES, BUILDINGS OR REAL PROPERTY.

5. "Construction-manager-at-risk" means a project delivery method in which:

(a) There is a separate contract for design services and a separate contract for construction services.

(b) The contract for construction services may be entered into at the same time as the contract for design services or at a later time.

(c) Design and construction of the project may be in sequential phases or concurrent phases.

(d) Finance services, maintenance services, operations services, preconstruction services and other related services may be included.

6. "Construction services" means either of the following for construction-manager-at-risk, design-build and job-order-contracting project delivery methods:

(a) Construction, excluding services, through the construction-manager-at-risk or job-order-contracting project delivery methods.

(b) A combination of construction and, as elected by the purchasing agency, one or more related services, such as finance services, maintenance services, operations services, design services and preconstruction services, as those services are authorized in the definitions of

construction-manager-at-risk, design-build or job-order-contracting in this section.

7. "Contract" means all types of state agreements, regardless of what they may be called, for the procurement of materials, services or construction or the disposal of materials.

8. "Contract modification" means any written alteration in the terms and conditions of any contract accomplished by mutual action of the parties to the contract.

9. "Contractor" means any person who has a contract with a state governmental unit.

10. "Data" means documented information, regardless of form or characteristic.

11. "Department" means the department of administration.

12. "Design-bid-build" means a project delivery method in which:

(a) There is a sequential award of two separate contracts.

(b) The first contract is for design services.

(c) The second contract is for construction.

(d) Design and construction of the project are in sequential phases.

(e) Finance services, maintenance services and operations services are not included.

13. "Design-build" means a project delivery method in which:

(a) There is a single contract for design services and construction services.

(b) Design and construction of the project may be in sequential phases or concurrent phases.

(c) Finance services, maintenance services, operations services, preconstruction services and other related services may be included.

14. "Design requirements":

(a) Means at a minimum the purchasing agency's written description of the project or service to be procured, including:

(i) The required features, functions, characteristics, qualities and properties.

(ii) The anticipated schedule, including start, duration and completion.

(iii) The estimated budgets applicable to the specific procurement for design and construction and, if applicable, for operation and maintenance.

(b) May include:

(i) Drawings and other documents illustrating the scale and relationship of the features, functions and characteristics of the project, which shall all be prepared by an architect or engineer, as appropriate, who is registered pursuant to section 32-121.

(ii) Additional design information or documents that the purchasing agency elects to include.

15. "Design services" means architect services, engineer services or landscape architect services.

16. "Designee" means a duly authorized representative of the director.

17. "Director" means the director of the department of administration.

18. "Employee" means an individual drawing a salary from a state governmental unit, whether elected or not, and any noncompensated individual performing personal services for any state governmental unit.

19. "Engineer services" means those professional engineer services that are within the scope of engineering practice as provided in title 32, chapter 1.

20. "Finance services" means financing for a construction services project.

21. "General services administration contract" means contracts awarded by the United States government general services administration.

22. "Grant" means the furnishing of financial or other assistance, including state funds or federal grant funds, by any state governmental unit to any person for the purpose of supporting or stimulating educational, cultural, social or economic quality of life. ~~, if there is no substantial involvement between the state governmental unit and the recipient during performance. Grant does not include an agreement whose primary purpose is to procure a specific end product in the form of materials, services or construction. A contract resulting from such an agreement is not a grant but a procurement contract.~~

23. "Job-order-contracting" means a project delivery method in which:

(a) The contract is a requirements contract for indefinite quantities of construction.

(b) The construction to be performed is specified in job orders issued during the contract.

(c) Finance services, maintenance services, operations services, preconstruction services, design services and other related services may be included.

24. "Landscape architect services" means those professional landscape architect services that are within the scope of landscape architectural practice as provided in title 32, chapter 1.

25. "Maintenance services" means routine maintenance, repair and replacement of existing facilities, structures, buildings or real property.

26. "Materials":

(a) Means all property, including equipment, supplies, printing, insurance and leases of property.

(b) Does not include land, a permanent interest in land or real property or leasing space.

27. "Operations services" means routine operation of existing facilities, structures, buildings or real property.

28. "Owner" means a state purchasing agency or state governmental unit.

29. "Person" means any corporation, business, individual, union, committee, club, other organization or group of individuals.

30. "Preconstruction services" means advice during the design phase.

31. "Procurement":

(a) Means buying, purchasing, renting, leasing or otherwise acquiring any materials, services, construction or construction services.

(b) Includes all functions that pertain to obtaining any material, services, construction or construction services, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.

32. "Procurement officer":

(a) Means any person duly authorized to enter into and administer contracts and make written determinations with respect to the contracts.

(b) Includes an authorized representative acting within the limits of the authorized representative's authority.

33. "Purchasing agency" means any state governmental unit which is authorized by this chapter or rules adopted pursuant to this chapter, or by way of delegation from the director, to enter into contracts.

34. "Services":

(a) Means the furnishing of labor, time or effort by a contractor or subcontractor which does not involve the delivery of a specific end product other than required reports and performance.

(b) Does not include employment agreements or collective bargaining agreements.

35. "State governmental unit" means any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.

36. "Subcontractor" means a person who contracts to perform work or render service to a contractor or to another subcontractor as a part of a contract with a state governmental unit.

37. "Using agency" means any state governmental unit which utilizes any materials, services or construction procured under this chapter.

Sec. 2. Section 41-2534, Arizona Revised Statutes, is amended to read:

41-2534. Competitive sealed proposals

A. If, under rules adopted pursuant to this chapter, the director determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to this state, a contract for materials or services may be entered into by competitive sealed proposals. This section does not apply to procurement of construction, ~~or~~ construction services OR SPECIFIED PROFESSIONAL SERVICES PURSUANT TO SECTION 41-2578, SUBSECTION A. Construction services shall be procured pursuant to section 41-2537 or 41-2578. The director may provide by rule that it is either not practicable or not advantageous to this state to procure specified types of materials or services by competitive sealed bidding.

B. Proposals shall be solicited through a request for proposals.

C. Adequate public notice of the request for proposals shall be given in the same manner as provided in section 41-2533.

D. Proposals shall be opened publicly at the time and place designated in the request for proposals. The name of each offeror and such other relevant information as is specified by rule shall be publicly read and recorded in accordance with rules adopted by the director. All other information contained in the proposals shall be confidential so as to avoid disclosure of contents prejudicial to competing offerors during the process of negotiation. The proposals shall be open for public inspection after contract award. To the extent the offeror designates and the state concurs, trade secrets or other proprietary data contained in the ~~bid~~ OFFER documents shall remain confidential in accordance with rules adopted by the director.

E. The request for proposals shall state the relative importance of price and other evaluation factors. Specific numerical weighting is not required.

F. As provided in the request for proposals, and under rules adopted by the director, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible to being selected for award for the purpose of clarification to assure full understanding of~~, and responsiveness to,~~ the solicitation requirements AND TO PERMIT REVISION OF OFFERS. Offerors shall be accorded fair treatment with respect to any opportunity for discussion ~~and revision of proposals, and such revisions~~. REVISIONS may be permitted after ~~submissions~~ SUBMISSION and before award ~~for the purpose of obtaining best and final offers~~. IF DISCUSSIONS ARE CONDUCTED, ALL OFFERORS WHO HAVE SUBMITTED PROPOSALS THAT ARE DETERMINED BY THE PROCUREMENT OFFICER TO BE IN THE COMPETITIVE RANGE SHALL BE INVITED TO SUBMIT A FINAL PROPOSAL REVISION. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

G. The award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to this state taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria may be used in the evaluation. The amount of any applicable transaction privilege or use tax of a political subdivision of this state is not a factor in determining the most advantageous proposal. The contract file shall contain the basis on which the award is made.

Sec. 3. Section 41-2535, Arizona Revised Statutes, is amended to read:

41-2535. Procurements not exceeding a prescribed amount; small businesses; exception for construction services contracts; simplified construction procurement program

A. Any procurement which does not exceed the aggregate dollar amount of ~~thirty-five~~ FIFTY thousand dollars may be made in accordance with rules adopted by the director, except that the procurements shall be made with such competition as is practicable under the circumstances.

B. Any procurement which does not exceed the aggregate dollar amount of less than ~~twenty-five~~ FIFTY thousand dollars shall be restricted, if practicable, to small businesses as defined in rules adopted by the director. The procurement officer shall rotate the small business solicited to compete for any procurement of less than ~~twenty-five~~ FIFTY thousand dollars. If it is impracticable to restrict a particular procurement to small businesses, the procurement officer shall make a determination setting forth the reasons and place it in the contract file.

C. Procurement requirements shall not be artificially divided or fragmented so as to constitute a purchase under this section and to circumvent the source selection procedures required by section 41-2533 or 41-2534 or be artificially combined to circumvent this section.

D. A procurement involving construction not exceeding one hundred thousand dollars may be made pursuant to rules adopted by the director in accordance with this section which shall be known as the simplified construction procurement program. At a minimum the rules shall require that:

1. A list be maintained of persons who desire to receive solicitations to bid on construction projects to which additions shall be permitted throughout the year.

2. The list of persons be available for public inspection.

3. Agreements for construction be on forms approved by the director.

~~4. A performance bond and a payment bond as required by section 41-2574 be provided for contracts for construction by contractors.~~

~~5.~~ 4. All information submitted by bidders pursuant to this section be confidential according to section 41-2533, subsection D.

~~6.~~ 5. All bids for construction be opened at a public opening.

~~7.~~ 6. All persons desiring to submit bids be treated equitably and the information related to each project be available to all eligible persons.

~~8.~~ 7. Competition for construction projects under the simplified construction procurement program be encouraged to the maximum extent possible.

Sec. 4. Section 41-2556, Arizona Revised Statutes, is amended to read:

41-2556. Demonstration projects

A. A demonstration project may be undertaken if the director determines in writing that the project is innovative and unique. This state shall not be obligated to pay the contractor, or to procure or lease the services or materials supplied by the contractor. HOWEVER, ON THE WRITTEN REQUEST AND JUSTIFICATION BY THE AGENCY AND WRITTEN DETERMINATION BY THE DIRECTOR THAT IT IS IN THE BEST INTEREST OF THIS STATE, THIS STATE MAY PAY THE CONTRACTOR FOR THE DEMONSTRATION PROJECT. The contract term shall not exceed two years. A REQUEST AND written determination of the basis for the contract award shall be included in the contract file.

B. A contract to procure or lease services or materials previously supplied during a demonstration project shall be conducted under ~~the provisions of~~ this article.

C. Except as otherwise provided by law, a contractor for a demonstration project shall not be precluded from participating as a bidder or offeror in a procurement for the services or materials supplied during a demonstration project.

Sec. 5. Section 41-2559, Arizona Revised Statutes, is amended to read:

41-2559. Public-private partnership contracts

A. ~~A purchasing agency~~ THE DIRECTOR may enter into public-private partnership contracts to finance the technology needs of the purchasing agency. The funding for services under a public-private partnership contract entered into pursuant to this section shall be contingent on and computed according to established performance standards and shall be attributable to the successful implementation of the technology program for the period specified in the contract. ~~A purchasing agency~~ THE DIRECTOR may issue requests for information and requests for proposals to solicit private partners that are interested in providing programs under a contract entered into pursuant to this section.

B. Each request for proposals issued pursuant to this section shall require each private partner to propose specific performance improvements and measurement approaches to be used to measure the value delivered by the vendor technology solution. The ~~purchasing agency~~ DIRECTOR shall include an assessment of the proposed value of the vendor technology solution in its evaluation criteria to select the best value solution for the purchasing agency.

C. A contract entered into between ~~a purchasing agency~~ THE DIRECTOR and an automated systems vendor shall provide for payment of fees on a contractually specific amount based on the achievement of measured performance improvements that are mutually agreed to by the contractor and the ~~purchasing agency~~ DIRECTOR and monies for payment of these fees are not subject to legislative appropriation. The following are subject to review and approval by the ~~head of the purchasing agency~~ DIRECTOR:

1. The terms of contracts entered into pursuant to this section relating to the measurement of the performance improvement attributable to the vendor technology program.

2. Payment of fees based on the achievement of the established performance measures.

D. Before a public-private partnership contract is awarded pursuant to this section, the joint legislative budget committee staff shall be consulted with regard to the potential fiscal impact of the contract to the state. If the joint legislative budget committee staff finds a significant negative fiscal impact to the state, the staff shall report its findings to the joint legislative budget committee.

Sec. 6. Section 41-2632, Arizona Revised Statutes, is amended to read:

41-2632. Cooperative purchasing authorized

A. Any public procurement unit may either participate in, sponsor, conduct or administer a cooperative purchasing agreement for the procurement

of any materials, services or construction with one or more public procurement units in accordance with an agreement entered into between the participants. A nonprofit educational or public health institution may enter into an agreement pursuant to this section if one or more of the parties involved is a public procurement unit. An agreement entered into as provided in this article is exempt from section 11-952, subsections D and F. Parties under a cooperative purchasing agreement may:

1. Sponsor, conduct or administer a cooperative agreement for the procurement or disposal of any materials, services or construction.

2. Cooperatively use materials or services.

3. Commonly use or share warehousing facilities, capital equipment and other facilities.

4. Provide personnel, except that the requesting public procurement unit shall pay the public procurement unit providing the personnel the direct and indirect cost of providing the personnel, in accordance with the agreement.

5. On request, make available to other public procurement units informational, technical or other services OR SOFTWARE that may assist in improving the efficiency or economy of procurement. The public procurement unit furnishing the informational, ~~or~~ technical OR OTHER services OR SOFTWARE has the right to request reimbursement for the reasonable and necessary costs of providing ~~such~~ THESE services OR SOFTWARE.

B. The school facilities board or school districts, or both, may enter into an agreement with a public procurement unit pursuant to this section for the purpose of procuring materials and services needed to correct deficiencies in school facilities as determined in section 15-2021.

C. The activities described in this section do not limit what parties may do under a cooperative purchasing agreement.

Sec. 7. Section 41-2701, Arizona Revised Statutes, is amended to read:

41-2701. Definitions

In this chapter, unless the context otherwise requires:

1. "Grant" means the furnishing of financial or other assistance, including state funds or federal grant funds, by any state governmental unit to any person for the purpose of supporting or stimulating educational, cultural, social or economic quality of life. ~~Grant does not include an agreement whose primary purpose is to procure a specific end product in the form of materials, services or construction. A contract resulting from such an agreement is not a grant but a procurement contract.~~

2. "Person" means any corporation, business, individual, committee, club or other organization or group of individuals.

3. "State governmental unit" means any department, commission, council, board, bureau, committee, institution, agency, government corporation or other establishment or official of the executive branch or corporation commission of this state.

APPROVED BY THE GOVERNOR MAY 4, 2004.

FILED IN THE OFFICE OF THE SECRETARY OF STATE MAY 4, 2004.